

FIRST REGULAR SESSION
[P E R F E C T E D]
SENATE SUBSTITUTE FOR
SENATE COMMITTEE SUBSTITUTE FOR
SENATE BILL NO. 168
93RD GENERAL ASSEMBLY

INTRODUCED BY SENATOR DOLAN.

Offered March 30, 2005.

Senate Substitute adopted, March 30, 2005.

Taken up for Perfection March 30, 2005. Bill declared Perfected and Ordered Printed, as amended.

0780S.06P

TERRY L. SPIELER, Secretary.

AN ACT

To amend chapters 213 and 431, RSMo, by adding thereto eight new sections relating to resolution of disputes concerning alleged defective residential construction, with an effective date for a certain section.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Chapters 213 and 431, RSMo, is amended by adding thereto eight new sections, to be known as sections 213.041, 431.300, 431.303, 431.306, 431.309, 431.312, 431.315, and 1, to read as follows:

213.041. 1. No declaration or other governing document of a homeowners association shall include a restrictive covenant in violation of section 213.040.

2. Notwithstanding any other provision of law or provision of the governing documents, the board of directors of a homeowners association shall amend, without approval of the owners, any declaration or other governing document that includes a restrictive covenant in violation of section 213.040, and shall restate the declaration or other governing document without the restrictive covenant but with no other change to the declaration or governing document.

3. If after providing written notice to a homeowners association requesting that the association delete a restrictive covenant in violation of section 213.040, and the association fails to delete the restrictive covenant within thirty days of receiving the notice, the Missouri commission on human rights, a city or county in which a common interest development is located, or any person may bring an action against the homeowners association for injunctive relief to enforce the

provisions of subsections 1 and 2 of this section. The court may award attorney's fees to the prevailing party.

4. The provisions of this section shall become effective on January 1, 2006.

431.300. As used in sections 431.300 to 431.315, unless the context clearly requires otherwise, the following terms shall mean:

(1) "Action", any civil lawsuit, action, or proceeding, in contract or tort, or otherwise, for damages or indemnity, brought to assert a claim, whether by petition, complaint, counterclaim, or cross-claim, for damage to, diminution in the value of, or the loss of use of real or personal property caused by an alleged construction defect. Action does not include any claim originating in small claims court, or any civil action in tort alleging personal injury or wrongful death to a person or persons resulting from an alleged construction defect;

(2) "Association":

(a) An association or unit owners' association as defined and provided for in subdivision (3) of section 448.1-103, RSMo;

(b) A homeowners' association, including but not limited to, a nonprofit corporation or unincorporated association of home owners created pursuant to a declaration to own and operate portions of a planned community or other residential subdivision and which has the power under the declaration to assess association members to pay the costs and expenses incurred in the performance of the association's obligations under the declaration, or tenants-in-common with respect to the ownership of common areas or amenities of a planned community or other residential subdivision; or

(c) Any cooperative form of ownership of multiunit housing;

(3) "Claimant", a homeowner or association which asserts a claim against a contractor concerning an alleged construction defect;

(4) "Construction defect", for the purposes of sections 431.300 to 431.315, a deficiency in, or a deficiency arising from, any of the following:

(a) Defective material, products, or components used in new residential construction or from a substantial remodel;

(b) Violation of the applicable codes and ordinances, including those ordinances which regulate zoning and the subdivision of land, in effect at the time of the commencement of construction of residential improvements, or as to a substantive remodel, at the commencement of such substantial remodel; provided however, that any matter that is in compliance with applicable codes and ordinances, including without limitation, those ordinances which regulate zoning and the subdivision of land, in effect at the commencement of construction of residential improvements, or to a substantial remodel as the case may be, shall

conclusively establish that such matter is not, nor shall it be deemed or construed to be a construction defect, unless a construction defect as to such matter is established because of defective material, products, or components used in new residential construction or in a substantial remodel;

(c) Failure to construct residential improvements in accordance with accepted trade standards for good and workmanlike construction at the time of construction. Compliance with the applicable codes and ordinances, including without limitation, those ordinances which regulate zoning and the subdivision of land, in effect at the commencement of construction, or of a substantial remodeling as the case may be, shall conclusively establish construction in accordance with accepted trade standards for good and workmanlike construction, with respect to all matters specified in those codes;

(d) Failure to construct residential improvements in accordance with the agreement between the contractor and the claimant, notwithstanding anything to the contrary in this subdivision;

(5) "Contractor", any person, company, firm, partnership, corporation, association, or other entity that is engaged in the business of designing, developing, constructing, or substantially remodeling residences;

(6) "Homeowner", any person, company, firm, partnership, corporation, association, or other entity who contracts with a contractor for the construction, substantial remodel of a residence, or the sale of a residence constructed by such contractor. Homeowner also includes a subsequent purchaser of a residence from any homeowner;

(7) "Residence", a single-family house, duplex, triplex, quadraplex, or a unit in a multiunit residential structure in which title to each individual unit is transferred to the owner under a condominium or cooperative system, and shall include common areas and common elements as defined in subdivision (4) of section 448.1-103, RSMo. Residence shall include the land and improvements to land under and around the house, unit, or structure. Residence shall not include a manufactured home as defined in section 700.010, RSMo;

(8) "Serve" or "service", personal service to the person intended to be notified or mailing to the last known address of such person;

(9) "Substantial remodel", a remodel of a residence, for which the total cost exceeds one-half of the assessed value of the residence for property tax purposes at the time the contract for the remodel work was made.

431.303. 1. The contractor shall provide notice to each homeowner upon entering into a contract for sale, construction, or substantial remodel of a residence of the contractor's right to offer to cure construction defects before a

claimant may commence action against the contractor pursuant to sections 431.300 to 431.315. Such notice shall be conspicuous and may be included as part of the underlying contract signed by the homeowner. In the sale of a condominium unit, the requirement for delivery of such notice shall be deemed satisfied if contained in a public offering statement in accordance with the laws of this state.

2. The notice required by this subsection shall provide time frame guidelines for dates to comply with sections 431.300 to 431.315 for both the claimant and contractor and shall be in substantially the following form:

SECTIONS 431.300 TO 431.315 OF MISSOURI REVISED STATUTES PROVIDES YOU WITH CERTAIN RIGHTS IF YOU HAVE A DISPUTE WITH A CONTRACTOR REGARDING CONSTRUCTION DEFECTS. EXCEPT FOR CLAIMS FILED IN SMALL CLAIMS COURT, IF YOU HAVE A DISPUTE WITH A CONTRACTOR, YOU MUST DELIVER TO THE CONTRACTOR A WRITTEN CLAIM OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE YOUR CONTRACTOR THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY THE CONTRACTOR. BEFORE YOU MAY FILE A LAWSUIT, YOU MUST SERVE A CLAIM AS NOTED ABOVE AND ATTEMPT TO RESOLVE THE CONSTRUCTION DEFECT DISPUTE AT LEAST NINETY DAYS BEFORE YOU FILE A LAWSUIT. READ THIS NOTICE CAREFULLY. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER SECTIONS 431.300 TO 431.315 WHICH MUST BE OBEYED IN ORDER TO PRESERVE YOUR ABILITY TO FILE A LAWSUIT. OTHER THAN REPAIRS TO WORK DONE BY THE CONTRACTOR THAT ARE NECESSARY TO PROTECT THE LIFE, HEALTH, OR SAFETY OF PERSONS LIVING IN A RESIDENCE, OR TO AVOID ADDITIONAL SIGNIFICANT AND MATERIAL DAMAGE TO THE RESIDENCE PURSUANT TO SECTION 431.306.10, YOU MAY NOT INCLUDE IN CLAIMS AGAINST YOUR CONTRACTOR THE COSTS OF OTHER REPAIRS YOU PERFORM BEFORE YOU ARE ENTITLED TO FILE A LAWSUIT UNDER SECTIONS 431.300 TO 431.315.

3. In addition to the notice required by subsection 2 of this section, the contractor shall also provide a flowchart describing the timeframe guidelines and process for complying with sections 431.300 to 431.315.

4. Nothing in sections 431.300 to 431.315 shall preclude or bar any action if a notice is not given to the claimant as required by this section, and the provisions of sections 431.300 to 431.315 shall not apply to any claim of a claimant against a contractor if such contractor failed to provide the written notice required by this section.

5. In those lawsuits originally filed by a contractor against a homeowner,

if a homeowner files a counterclaim or an affirmative defense in such lawsuit that includes a claim based on a construction defect allegedly caused by the contractor, then the provisions of sections 431.300 to 431.315 shall not apply to said lawsuit, and the homeowner or association claimant will not be required to adhere to sections 431.300 to 431.315 for those claims made pursuant to the lawsuit, provided a claimant shall be required to follow those provisions for any claim not otherwise covered by said lawsuit.

431.306. 1. In every action against a contractor arising from construction or substantial remodel of a residence, a claimant shall serve the contractor with a written notice of claim of construction defects. Prior to commencing any action alleging a construction defect or after the dismissal of any action without prejudice pursuant to subsection 6 of this section, the claimant must wait ninety days after serving the contractor with the written notice of claim of construction defect before filing an action or before becoming a member of a class certified pursuant to the applicable rules of civil procedure. The notice of claim shall state that the claimant asserts a construction defect claim against the contractor and shall describe the claim in reasonable detail sufficient to determine the general nature of the defect as well as any known results of the defect.

2. Within fourteen days after service of the notice of claim, the contractor shall serve a written response on the claimant which shall:

(1) Propose to inspect the residence that is the subject of the claim and to complete the inspection within a specified time frame. The proposal shall include the statement that the contractor shall, based on the inspection, thereafter offer to remedy the defect within a specified time frame, compromise by payment, or dispute the claim; or

(2) Offer to remedy the claim without an inspection within a specified time frame; or

(3) Offer to remedy part of the claim without inspection and compromise and settle the remainder of the claim by monetary payment within a specified time frame; or

(4) Offer to compromise and settle all of a claim without inspection. A contractor's offer pursuant to this subdivision to compromise and settle a claimant's or association's claim may include, but is not limited to, an express offer to purchase the claimant's residence that is the subject of the claim; or

(5) State that the contractor disputes the claim and will neither remedy the construction defect nor compromise and settle the claim.

3. (1) If the contractor disputes the claim pursuant to subdivision (5) of subsection 2 of this section or does not respond to the claimant's notice of claim

within the time stated in subsection 2 of this section, the claimant may bring an action against the contractor for the defect described in the notice of claim without further notice.

(2) If the claimant rejects the inspection proposal or the settlement offer made by the contractor pursuant to subsection 2 of this section, the claimant shall serve written notice of the claimant's rejection on the contractor. The notice shall include the basis for claimant's rejection. After service of the rejection, the claimant and contractor may attempt to resolve the claim through mediation in accordance with section 431.312. If the claim is not resolved through mediation, the claimant may bring an action against the contractor for the construction defect claim without further notice described in the notice of claim. If the contractor has not received from the claimant within thirty days after the claimant's receipt of the contractor's response either an acceptance or rejection of the inspection proposal or settlement offer, the contractor may at any time thereafter terminate the proposal or offer by serving written notice to the claimant. If the contractor so terminates the proposal, the claimant may thereafter bring an action against the contractor for the defect described in the notice of claim without further notice.

(3) If the claimant elects to accept the offer of the contractor to remedy the claim without an inspection pursuant to subdivision (2) of subsection 2 of this section, or if the claimant elects to accept the offer of the contractor to remedy part of the claim without inspection and compromise and settle the remainder of the claim by monetary payment pursuant to subdivision (3) of subsection 2 of this section, the claimant shall provide the contractor and its contractors or other agents reasonable access to the claimant's residence during normal working hours to perform and complete the construction or work in accordance with the timetable stated in the offer. Any dispute relating to performance of the remedial construction or work by the contractor may be resolved by mediation in accordance with section 431.312. If the dispute is not resolved by mediation, the claimant may bring an action against the contractor for the defect described in the notice of claim.

4. (1) If the claimant elects to allow the contractor to inspect in accordance with the contractor's proposal pursuant to subdivision (1) of subsection 2 of this section, within fourteen days after the date of the claimant's election to allow an inspection is communicated to the contractor, the claimant and contractor shall agree on a time and date for the inspection, and such inspection shall occur within fourteen days from the date of the communication of such election for an inspection unless the claimant and contractor agree to a later date. The claimant shall provide the contractor and its subcontractors, suppliers, or other agents

reasonable access to the claimant's residence during normal working hours to inspect the premises and the claimed defect. The contractor shall perform the inspection at its own cost. If destructive testing is necessary, the contractor shall repair all damage caused by the testing.

(2) Within fourteen days following completion of the inspection, the contractor shall serve a report of the scope of the inspection and the findings and results of the inspection on the claimant, and either:

(a) A written offer to remedy all of the claim at no cost to the claimant, including a description of the construction or work necessary to remedy the defect described in the claim, and a timetable for the completion of such construction or work; or

(b) A written offer to remedy part of the claim, and compromise and settle the remainder of the claim by monetary payment, within a specified time frame; or

(c) A written offer to compromise and settle all of the claim by monetary payment pursuant to subdivision (2) of subsection 2 of this section; or

(d) A written statement that the contractor will not proceed further to remedy the defect.

(3) If the contractor does not proceed further to remedy the construction defect within the stated timetable, or if the contractor fails to comply with the provisions of subdivision (2) of this subsection, the claimant may bring an action against the contractor for the defect described in the notice of claim without further notice.

(4) If the claimant rejects the offer made by the contractor pursuant to paragraph (a), (b), or (c) of subdivision (2) of this subsection to either remedy the construction defect or remedy part of the claim and make a monetary settlement as to the remainder of the claim or to compromise and settle the claim by monetary payment, the claimant shall serve written notice of the claimant's rejection and the reasons for the rejection on the contractor. After service of the rejection notice, the claimant and contractor may attempt to resolve the dispute through mediation in accordance with section 431.312. If the dispute is not resolved through mediation, the claimant may bring an action against the contractor for the defect described in the notice of claim. If the contractor has not received from the claimant within thirty days after the claimant's receipt of the contractor's response either an acceptance or rejection of the offer made pursuant to paragraph (a), (b), or (c) of subdivision (2) of this subsection, the contractor may at any time thereafter terminate the offer by serving written notice to the claimant. If the contractor so terminates its offer, the claimant may bring an

action against the contractor for the claim described in the notice of claim without further notice.

5. (1) Any claimant accepting the offer of a contractor to remedy all or part of the construction defect pursuant to paragraph (a) or (b) of subdivision (2) of subsection 4 of this section shall do so by serving the contractor with a written notice of acceptance within a reasonable time period after receipt of the offer, and no later than thirty days after receipt of the offer. The claimant shall provide the contractor and its subcontractors or other agents reasonable access to the claimant's residence during normal working hours to perform and complete the construction or work by the timetable stated in the offer. Any dispute relating to performance of the remedial construction or work by the contractor may be resolved by mediation in accordance with section 431.312. If the dispute is not resolved by mediation, the claimant may bring an action against the contractor for the defect described in the notice of claim.

(2) The claimant and contractor may, by mutual written agreement, alter the extent of construction or the timetable for completion of construction stated in the offer, including, but not limited to, repair of additional defects.

6. Any action commenced by a claimant prior to compliance with the requirements of this section shall, upon motion by a party to the action, be subject to dismissal without prejudice, and shall not be recommenced until the claimant has complied with the requirements of this section if the court finds the claimant knowingly violated the sections of said act.

7. The claimant may amend the notice of claim to include construction defects discovered after the service of the original notice of claim and shall otherwise comply with the requirements of this section for the additional claims. Claims for defects discovered after the commencement or recommencement of an action may be added to such action only after providing notice to the contractor of the defect and allowing for response under subsection 2 of this section.

8. If, during the pendency of the notice, inspection, offer, acceptance, or repair process, an applicable limitations period would otherwise expire, the claimant may file an action against the contractor, but such action shall be immediately abated pending completion of the notice of claim process described in this section. This subsection shall not be construed either to revive a statute of limitations period that has expired prior to the date on which a claimant's written notice of claim is served or extend any applicable statute of repose.

9. A written notice of claim and any written response by a contractor shall be treated as a settlement offer and shall not be admissible in an action related to

a construction defect asserted therein, except as otherwise permitted by law. A written notice of claim and any written response by a contractor shall not be admissible as a prior inconsistent statement.

10. In the event that immediate action must be taken by a claimant to prevent imminent injury to persons because of alleged construction defects, including defective garage doors, that threaten the life or safety of persons, or alleged construction defects, including defective garage doors, that if not addressed will result in significant and material additional damage to the residence, the homeowner or another person designated by the homeowner including the contractor may undertake reasonable repairs necessary to mitigate the emergency situation. Claimants may thereafter include the cost of such repairs in the written notice of claim of construction defects provided for in subsection 1 of this section. Provided, however, that other than the undertaking of immediate repairs to remedy an emergency situation, any repairs to construction defects undertaken by homeowners shall not be included in claims initiated under subsection 1 of this section, and shall not be the subject of an action.

11. The mediation shall take place in the county where the claimant resides or in a mutually agreed to location.

431.309. 1. (1) If an association or an executive board acting on behalf of an association institutes an action asserting defects in the construction of two or more residences, common elements, or common areas, the provisions of this section shall apply. For purposes of this section, "action" has the same meaning as set forth in subsection 1 of section 431.300.

(2) The board of directors or executive board of the association shall substantially comply with the provisions of this section.

2. (1) Prior to filing an action alleging a construction defect, the association or board of directors or executive board shall serve written notice of the anticipated commencement of such action to each claimant who is a member of the association at the last known address described in the association's records.

(2) The notice required by subdivision (1) of this subsection shall state a general description of the following:

(a) The nature of the action and the relief sought; and
(b) The expenses and fees that the board of directors or executive board anticipates will be incurred in prosecuting the action.

(3) The association or board of directors or executive board shall obtain written consent to proceed with the action from a majority of the homeowners who are members of the association.

3. Nothing in this section shall be construed to:

(1) Require the disclosure in the notice or the disclosure to a unit owner of attorney-client communications or other privileged communications;

(2) Permit the notice to serve as a basis for any person to assert the waiver of any applicable privilege or right of confidentiality resulting from or to claim immunity in connection with the disclosure of information in the notice; or

(3) Limit or impair the authority of the association or executive board to contract for legal services, limit or impair the ability of the association or executive board to make such repairs to a unit, common area, or common element as are required to protect the health, safety, and welfare of the units' owners, or limit or impair the ability to enforce such a contract for legal services.

431.312. 1. If a contractor either fails to respond to a written notice of claim or completely disputes a written notice of claim and refuses to remedy pursuant to subdivision (1) of subsection 3 of section 431.306, or a contractor takes no action to remedy a defect following inspection, or takes no action following an offer to remedy or takes no action following an offer to remedy part of a defect and compromise and settle the remainder, or does not provide a written offer to remedy or compromise as provided in section 431.306, the claimant shall not be required to wait ninety days after serving the contractor with notice of claim as provided in section 431.306 before filing an action. At any time, either a claimant or contractor may offer to resolve a claim against a contractor through mediation. Mediation pursuant to this section shall be nonbinding and independently administered. The contractor and claimant shall mutually agree upon a qualified independent and neutral mediator and shall equally share the cost of the mediator. If the parties agree upon a mediator, then the mediation shall take place within a reasonable time period, but in no event later than forty-five days after service of a request for mediation by a claimant upon a contractor or a request by a contractor upon a claimant. A contractor who receives a request for mediation from a claimant shall serve a response in writing within fourteen days and shall include within the response the name of a proposed mediator and mediation date. A claimant who receives a request for mediation from a contractor shall serve a response in writing within fourteen days and shall include within the response the name of a proposed mediator and mediation date.

2. The contractor or claimant may include in the mediation any person or entity reasonably necessary for resolution of the claim asserted. This subsection shall not be construed to mandate attendance at a mediation by a person or entity other than the contractor or claimant served with a notice of claim.

3. If all the parties to a dispute agree in writing to submit their dispute to any forum for arbitration, conciliation, or mediation, then no person who serves

as arbitrator, conciliator or mediator, nor any agent or employee of that person, shall be subpoenaed or otherwise compelled to disclose any matter disclosed in the process of setting up or conducting the arbitration, conciliation, or mediation.

4. Arbitration, conciliation, and mediation proceedings shall be regarded as settlement negotiations and the confidentiality of such proceeding shall be as set forth in supreme court rule 17.

5. Notwithstanding any provisions of law or the agreements of the parties to the contrary, the resolution of the dispute by the parties through mediation or otherwise shall not operate to release any claim of the claimant except the claim described in the notice of defect, and shall not operate to release the claim described in the notice of defect until the agreed upon remedy has been accomplished.

431.315. 1. Nothing in sections 431.300 to 431.315 shall be construed to create a theory or cause of action upon which liability may be based or to limit any causes of action or remedies otherwise available to a homeowner or contractor pursuant to law after giving effect to the provisions of sections 431.300 to 431.315, nor to hinder or otherwise affect the employment, agency, or contractual relationship between homeowners and contractors during the process of construction or remodeling, and does not preclude the termination of those relationships as allowed under current law. Nothing in sections 431.300 to 431.315 shall negate or otherwise restrict a contractor's right to access or inspection provided by law, covenant, easement, or contract.

2. Nothing in sections 431.300 to 431.315 shall be construed to prevent contracts between contractors and homeowners from specifying that disputes shall be resolved by binding arbitration pursuant to chapter 435, RSMo. In contracts between contractors and homeowners that specify binding arbitration as the means of dispute resolution, sections 431.300 to 431.315 shall not be applicable; provided, in those contracts between contractors and homeowners that specify binding arbitration as the means of dispute resolution, the contractor shall provide notice, pursuant to section 435.460, that disputes may be resolved by binding arbitration and sections 431.300 to 431.315 are not applicable to such transactions.

3. The provisions of sections 431.300 to 431.315 shall not apply to an action brought by an insurer, subrogated to the rights of a claimant, if payment was made by the insurer pursuant to a claim under an insurance policy.

Section 1. If any provision of sections 431.300 to 431.315, RSMo, is found by a court of competent jurisdiction to be invalid or unconstitutional it is the stated intent of the general assembly that the general assembly would have approved the remaining portions of sections 431.300 to 431.315, RSMo, and the remaining

portions of sections 431.300 to 431.315, RSMo, shall remain in full force and effect.

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